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In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES, BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO,

Petitioners,

v.

PAMELA GILLIE AND HAZEL MEADOWS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Plaintiffs concede that Congress passed the Fair Debt Collection Practices Act ("Act") to bar defined "debt collectors" from "brutish" practices, like threatening debtors with jail or lying that their son's legs had been severed. Resp. Br. 15-16. This purpose reveals the wide gulf between this case and that Act. Plaintiffs sue the Attorney General's special counsel for following a traditional directive of the Attorney General's Office—to use its letterhead when recovering debts for the state creditors that the office (including special counsel) represents. For two reasons, the Act does not extend this far.

First, special counsel are not "debt collectors"; they are state "officers" appointed to represent state clients. Plaintiffs argue that special counsel cannot be "officers" because they contract with the office. But the special-counsel position exists with or without contracts. And the *common* meaning of "officer" includes "special" deputies who receive "the protection which the law affords to the regular officer." William Murfree, *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 83, p.48 (1884); *Filarsky v. Delia*, 132 S. Ct. 1657, 1664 (2012). That is why Plaintiffs cite cases on the *constitutional* meaning of "officer." And it is why they ignore the Dictionary Act's definition, which includes *any* person, not just *principal* officers. Plaintiffs' criticism of the special-counsel contracts also undercuts the Act's goals. Those contracts require counsel to follow its standards even for debts—like tax debts—as to which Plaintiffs concede it does *not* apply.

Second, special counsel's use of Attorney General letterhead *accurately* conveys that they send letters as special counsel, not private lawyers. Plaintiffs

read the Act to ban these letters—whether or not they mislead—because allegedly *only* employees may use an entity's letterhead. Plaintiffs cite nothing but a false analogy for this claim: that special counsel's use of Attorney General letterhead is like a private lawyer using a private creditor's letterhead. Resp. Br. 44; U.S. Br. 32. Yet the creditors here are *state universities*, not the *Attorney General's Office*. The latter entity is a debt-collecting law office. If anything, special counsel's use of the office's letterhead signals to debtors that they may call the office with concerns.

This suit exemplifies the "'cottage industry' of litigation that has arisen" under the Act. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 617 (2010) (Kennedy, J., dissenting) (citation omitted). Allowing it to proceed further would place that industry's interests above the interests of unsophisticated consumers, conscientious collectors, and sovereign States. The Court should not permit this distortion of the Act.

I. SPECIAL COUNSEL ARE STATE "OFFICERS"

A. Plaintiffs Misinterpret "Officer"

Plaintiffs interpret the term "officer" in both the Dictionary Act and the Act too narrowly.

1. Plaintiffs misread the Dictionary Act

Every judge to consider this case devoted pages to the Dictionary Act. Plaintiffs devote one. Resp. Br. 26. They instead seek a two-part test: (1) that "officers" must fill positions with duties and incidents set by statutes, not contracts, and (2) that "officers" must have continuing duties. *Id.* at 20 (citing *Metcalf &*

Eddy v. Mitchell, 269 U.S. 514 (1926)). This test contradicts text, history, and precedent.

Text. Plaintiffs ignore the text. Yet courts "must" consult the Dictionary Act when determining a law's meaning. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014). That rule applies especially to words, like officer, carrying many meanings—from a narrow constitutional meaning, *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), to a broad popular one, *United States v. Hendee*, 124 U.S. 309, 313 (1888).

The Dictionary Act's text communicates the broad meaning. It covers *every* individual ("any person") statutorily empowered ("authorized by law") to perform sovereign duties ("duties of the office"). This codified the "sense in which the term 'officer' [was] understood in common language" in 1871. *Sanner v. State*, 2 Tex. App. 458, 459 (1877). It reached any "person commissioned or authorized to perform any public duty." 2 Noah Webster, *An American Dictionary of the English Language* (1828).

Plaintiffs' test conflicts with this text. "Authorized by law" means that a statute "empowers" a position; it does not require the statute to specify the position's details or prohibit its occupants from contracting. 1 *The Century Dictionary & Cyclopedia* 387 (1897). "Office" means a "public charge"; it does not require an indefinite one. *Rowland v. Mayor of N.Y.*, 83 N.Y. 372, 376 (1881).

History. Plaintiffs claim to apply officer's "historical" meaning. Resp. Br. 19. But they do not cite cases in the decades around 1871 for purposes of *clarifying* the Dictionary Act. *Cf. Lamar v. United States*, 241 U.S. 103, 112-13 (1916). They cite much

later cases—like *Metcalf*—for purposes of *overriding* it. A "transplanted" word "brings the old soil with it," not new soil that has yet to be cultivated. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

History undercuts Plaintiffs. Cases did not require a law to specify a position's duties; a superior could "prescribe" them. *United States v. Hartwell*, 73 U.S. 385, 393 (1867). Cases "uniformly" allowed officers and deputies to contract. *Cheek v. Tilley*, 31 Ind. 121, 126-27 (1869). And cases rejected "the idea[] that a public office must have continuance." *Clark v. Stanley*, 66 N.C. 59, 63-64 (1872). Thus, receivers or special deputies—appointed to liquidate *one* bank or perform *one* duty—were officers. *Stanton v. Wilkeson*, 22 F. Cas. 1074, 1075 (S.D.N.Y. 1876); *State v. Moore*, 39 Conn. 244, 250 (1872).

This is unsurprising. Government was long "'administered by members of society who temporarily or occasionally discharge[d] public functions.'" *Filarsky*, 132 S. Ct. at 1662 (citation omitted). While *Filarsky* held only that contractors received § 1983's immunities, Resp. Br. 34-35, it recounted how courts treated many contractors as officers. "[A]t common law," a special constable was "'as fully protected as any other officer.'" 132 S. Ct. at 1664 (citation omitted).

Precedent. Claiming to invoke the *common law*, Plaintiffs primarily invoke the *Constitution*. Resp. Br. 19-25. Several cases directly interpreted it. *United States v. Maurice*, 26 F. Cas. 1211, 1213-15 (C.C.D. Va. 1823), found an agent of fortifications to be an "officer" under the *Appointments Clause*. *Auffmordt* held that an appraiser was not such an officer. 137 U.S. at 326-28. *Burnap v. United States*,

252 U.S. 512, 517-19 (1920), held that a landscape architect need not be removed through the clause's methods. Finally, *Hall v. Wisconsin*, 103 U.S. 5, 7-11 (1880), asked whether the *Contracts Clause* protected a state contract—so the Court considered "office's" meaning *for that clause*.

Other cases read "officer" in criminal and tax statutes to adopt its *constitutional* meaning. Criminal laws trigger the rule of lenity. *Hendee v. United States*, 22 Ct. Cl. 134, 141 (1887). So the Court held that an extortion law reached *only* constitutional officers. *United States v. Germaine*, 99 U.S. 508, 509-10 (1878). Tax laws bring a *sui generis* history. *Collector v. Day*, 78 U.S. 113 (1871), held that the *Constitution* barred taxing a state officer's income. For decades, tax statutes exempted (or were interpreted to exempt) state "officers or employees." The exemptions targeted "those officers who under the Constitution could not be taxed." *Revenue Revision, 1925: Hearings Before the H. Com. On Ways and Means*, 69th Cong. 196-97 (1925) (Statement of Solicitor of Internal Revenue). When holding that engineers were not officers under a statutory exemption, *Metcalf* applied a *constitutional* meaning—as shown by its reliance on *Maurice*, *Hall*, *Germaine*, and *Auffmordt*. 269 U.S. at 519-20; *Buckner v. Comm'r*, 77 F.2d 297, 298 (2d Cir. 1935) (taxpayer immune "only if the imposition of tax would be unconstitutional"); *cf. Rand v. Comm'r*, 27 B.T.A. 182 (1932).

While these cases show what is *sufficient* for officer status, Plaintiffs claim they set *necessities*. But "officer" often is "used in a statute in a different sense from that in which [it is] used in the Constitution." *Lamar v. United States*, 240 U.S. 60, 65

(1916). This Court identified a "prohibition agent" as an officer under a search-warrant law, though not a constitutional officer. *Steele v. United States*, 267 U.S. 505, 506-08 (1925). Courts have treated "fiscal intermediaries"—private insurers—as federal "officers or employees" under Medicare. *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 487-88 (7th Cir. 1990). The United States believes that Special Federal Officers (those not employed by the federal government) fall within bans against assaulting officers. Brief for U.S. at 15-20, *in United States v. Luna*, 649 F.3d 91 (1st Cir. 2011). And Attorney General Kennedy found "intermittent consultants" to be "officers or employees" for former conflict-of-interest laws. 42 Op. Att'y Gen. 111, 111 (1962).

In sum, Plaintiffs' reliance on constitutional cases is like relying on *Employment Division v. Smith*, 494 U.S. 872 (1990), as the reason why a religious-liberty claim fails the Religious Freedom Restoration Act. The Dictionary Act adopts a common, not a constitutional, meaning of "officer."

2. Plaintiffs misread the Act

The Act's text and the clear-statement rule show that it incorporates the Dictionary Act's broad definition. Plaintiffs' responses fail.

Text. Plaintiffs interpret "officer" in the government exemption narrowly because "officer" in the creditor exemption is narrow. They say: (1) the *text* must mean the same thing in both places, and (2) the exemptions' *purpose* distinguishes covered collectors *outside* a creditor from exempt collectors *inside* a

creditor—for private and public creditors alike. Resp. Br. 17-19. Not so.

Start with text. The "presumption of consistent usage readily yields to context." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441-42 (2014) (internal quotation marks omitted). The United States knows this well. *King v. Burwell*, 135 S. Ct. 2480, 2493 n.3 (2015) ("established by the State" can "mean different things in different places"). "Officer" of a creditor conveys something different from "officer" of a government. The "creditor" definition (covering "person[s]") limits it to *private* corporations. 15 U.S.C. § 1692a(4); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000). "In corporations," officer means "a person charged with important functions of management such as president, vice president, treasurer, etc." *Black's Law Dictionary* 977 (5th ed. 1979); 2 Fletcher Cyc. Corp. § 266 (1990). In governments, "officer" means a person "'who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits.'" Floyd Mechem, *A Treatise on the Law of Public Offices and Officers* § 9, p.7 (1890) (citation omitted). Police officers qualify, *Policemen as Public Officers*, 84 A.L.R. 309 (1933), as do notaries, Mechem, *supra*, § 47, p.18.

Turn to purpose. Plaintiffs' distinction between collectors inside and outside of creditors reads the creditor exemption too broadly and the government exemption too narrowly. The *narrow* creditor exemption exists because a creditor's reputational concerns will lead it to respect debtors. S. Rep. No. 95-382, at 2 (1977). The Act excludes creditors *only* when collecting "in the[ir] name," 15 U.S.C. § 1692a(6)(A), not

otherwise, *id.* § 1692a(6). The *broad* government exemption exists to respect governments—period. It excludes governments no matter the name they use. *Id.* § 1692a(6)(C). It excludes them when they are *outside* collectors—such as the United States collecting for States. Pet. App. 59a (Sutton, J., dissenting). It even excludes "sheriffs" executing judgments for *private* creditors. S. Rep. No. 95-382, at 3. They can appoint special deputies, 80 C.J.S. *Sheriffs and Constables* § 44, who historically received the same protections, Murfree, *supra*, § 83, p.48.

Clear-Statement Rule. Plaintiffs contend that the clear-statement rule does not apply because "Congress spoke clearly." Resp. Br. 35. Yet they conceded below that officer was ambiguous. Pet. App. 60a (Sutton, J., dissenting).

Plaintiffs next argue that laws "'touch[ing] a sensitive area'" do not trigger the rule. Resp. Br. 37. Yet it applies "[i]n traditionally sensitive areas." *United States v. Bass*, 404 U.S. 336, 349 (1971). If the rule applies to criminal laws that do not regulate States, *id.*, it applies to Plaintiffs' efforts to divide an officer from the officer's deputies. Just as *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002), preserved Ohio's "traditional right" to delegate to municipalities, Resp. Br 37, the Court should preserve Ohio's traditional right to delegate to part-time officers, *Filarsky*, 132 S. Ct. at 1662-63.

Plaintiffs retort that Ohio has no interest in the "thuggish methods" barred by the Act. Resp. Br. 36. Such rhetoric could be used in most cases triggering the clear-statement rule. States are uninterested in violating the Constitution, but § 1983 incorporates traditional immunities. That is because States *do*

have an interest in "preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky*, 132 S. Ct. at 1665. This case is Exhibit A. For years, the Attorney General's Office and special counsel have spent time and expense defending against Plaintiffs' attack on the way the office operates. This has distracted them from "vital" operations. J.A. 128.

Plaintiffs lastly seek to jettison the clear-statement rule, asserting that this *statutory* rule is like the *constitutional* rule rejected by *Garcia v. San Antonio Transit Authority*, 469 U.S. 528 (1985). Resp. Br. 39. There is a big difference between the legislative "clarity" question here (whether Congress has *clearly* intruded on state interests) and the legislative "power" question there (whether Congress may *constitutionally* do so). *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 698 (1999) (Breyer, J., dissenting). *Garcia* mandates the clear-statement rule: "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." Laurence Tribe, *American Constitutional Law* § 6-25, p.480 (2d ed. 1988).

B. Plaintiffs' Arguments Confirm Special Counsel's "Officer" Status

Special counsel are legally authorized to perform sovereign duties.

1. *Authorized By Law.* Plaintiffs say state law does not identify an "office of [the] special counsel." Resp. Br. 22. Yet a party's "official or unofficial character" is determined "by the nature of the[ir]

functions," not "their name." *State ex rel. Att'y Gen. v. Kennon*, 7 Ohio St. 546, 557-58 (1857). The law in *Hartwell* did not identify an "office of the clerk"; it permitted a superior to "appoint" the clerk. 73 U.S. at 392-93. Federal law does not even identify an "office of Solicitor General." It permits the President to appoint "a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties." 28 U.S.C. § 505. Magic language is not required.

Plaintiffs next say Ohio law "prescribe[s] no particular duties" for special counsel. Resp. Br. 22. That is wrong: Ohio Rev. Code § 109.08 identifies *precise* duties—recovering debts. It is also irrelevant: A superior may specify the duties. Beyond *Hartwell*, 73 U.S. at 393, "many cases" hold "that an employment may be none the less an *office*, although the duties are to be prescribed by a superior." *Patton v. Bd. of Health*, 59 P 702, 706 (Cal. 1899).

Because officers must be *legally* authorized, Plaintiffs claim, the *contracts* disqualify special counsel. Resp. Br. 22-23. They stretch this rule too far. It does not bar officers from contracting; it bars non-officers from saying contracts give them "officer" status. The special-counsel position arises from laws, not contracts. Ohio identifies it within its "civil service," Ohio Rev. Code § 124.11(A)(11), which includes "offices and positions of trust," *id.* § 124.01(K). That an Attorney General *also* contracts with special counsel does not change things. As one court said when finding a special deputy to be an officer, "[w]hether the sheriff pays him a salary or not, or is bound to bear his official expenses, is a matter of contract between them with which the public have

nothing to do, and the terms of which can not change his official character." *Reves v. State*, 79 Tenn. 124, 126 (1883); *Bynum v. Knighton*, 73 S.E. 400, 400 (Ga. 1911). Likewise, deputy marshals once "contract[ed] with the marshal for [their] compensation." *Powell v. United States*, 60 F. 687, 689 (M.D. Ala. 1894).

Plaintiffs also mistakenly cite specific contract provisions. Resp. Br. 22-23. Terms barring special counsel from invoking laws regarding the defense and indemnification of officers would be superfluous if special counsel were not officers. *Bell v. Newnham*, 1990 WL 131972, *2 (Ohio Ct. App. Sept. 14, 1990). And those laws are waivable; they "do not deprive any officer or employee of the right to select counsel of his own choice or settle his case at his own expense." Ohio Rev. Code § 109.361. The public-records laws are not waivable. Plaintiffs' assertion that the Attorney General cannot evade those laws by outsourcing collection (Resp. Br. 23 n.2) is a concession that special counsel perform "governmental function[s]." *State ex rel. Schiffbauer v. Banaszak*, 33 N.E.3d 52, 54-55 (Ohio 2015). Regardless, officer's meaning in *state law* is irrelevant because "officer" *in the Act* looks to general principles. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989).

Plaintiffs next assert that special counsel cannot be officers because the Attorney General may appoint *undefined* numbers. Resp. Br. 24-25. Many "officer" positions do not identify precise numbers. The U.S. Attorney General "may appoint" an undefined number of assistant U.S. Attorneys, 28 U.S.C. § 542, who have been called officers in the "strictest sense," 31 Op. Att'y Gen. 201, 205 (1918). Sheriffs also could appoint any number of deputies. 80 C.J.S.

Sheriffs and Constables § 33; *Taylor v. Brown*, 4 Cal. 188, 188 (1854). Just as special deputies perform assigned duties, *Moore*, 39 Conn. at 250, so too do special counsel.

Citing Mechem, *supra*, § 38 p.17, Plaintiffs respond, special deputies are not officers. Resp. Br. 33. Mechem relied on dicta from *Kavanaugh v. State*, 41 Ala. 399 (1868). The Alabama Supreme Court *rejected* its dicta when holding that special deputies fell within officer's "generic meaning." *Andrews v. State*, 78 Ala. 483, 485 (1885); *see also, e.g.*, *Putman v. State*, 5 S.W 715, 717 (Ark. 1887); *Reves*, 79 Tenn. at 126; *Moore*, 39 Conn. at 250; *Dungan v. Hall*, 64 Ill. 254, 255 (1872); Murfree, *supra*, §§ 83, 1121, pp.48, 609; Richard Clarke Sewell, *A Treatise on the Law of Sheriff* 46 (1842).

2. *Sovereign Duties.* Plaintiffs say that special counsel do not "execute" laws. Resp. Br. 28. Yet they execute the law requiring the Attorney General to collect debts. Litigation is a sovereign task. *Commonwealth v. Evans*, 74 Pa. 124, 139-40 (1874); *People v. Miner*, 2 Lans. 396, 398 (N.Y. Sup. Ct. 1868). Only *constitutional* officers may undertake "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights." *Buckley v. Valeo*, 424 U.S. 1, 140 (1976).

Even so, Plaintiffs respond, special counsel lack *independent* authority. Resp. Br. 29-30; U.S. Br. 20. Independence is not required. An entire category of officers (ministerial) "'execute the mandates, lawfully issued, of their superiors.'" Mechem, *supra*, § 21, p.10 (citation omitted); 2 John Bouvier, *A Law Dictionary* 203 (1839) (ministerial office "give[s] the officer no power to judge of the matter to be done, and

require[s] him to obey the mandates of a superior"). Even some constitutional officers lack independence. A "*necessary* condition" of "inferior" officers is that they be "subordinate." *Morrison v. Olson*, 487 U.S. 654, 722 (1988) (Scalia, J., dissenting).

Plaintiffs counter that *this case* involves sending letters, not filing complaints. Resp. Br. 29. But "officer" status depends on a position's overall duties. And "legal services" are public charges. J.A. 173. The Attorney General is an "officer" when sending letters, as are special counsel. *Cf. Disciplinary Counsel v. Brown*, 905 N.E.2d 163, 167 (Ohio 2009) (practicing law includes sending collection letters and negotiating claims). Even under the Constitution, "that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status." *Freytag v. Comm'r*, 501 U.S. 868, 882 (1991).

No Oath. Plaintiffs note that special counsel take no oaths. Resp. Br. 25. Neither the Dictionary Act nor the common law required this. An oath was "not an indispensable criterion and the office may exist without it." Mechem, *supra*, § 6 p.6; *Turner v. Holtzman*, 54 Md. 148, 159 (1880).

* * *

The clear-statement rule applies because it is at least ambiguous whether special counsel are officers. Congress *itself* thought so. As Plaintiffs note (Resp. Br. 18), it said that private lawyers collecting *federal* debts were "debt collectors" "[n]otwithstanding" the Act's exemptions. 31 U.S.C. § 3718(b)(6). Plaintiffs' view makes this provision superfluous. Congress

reasonably could have believed that the attorneys were "officers" in a broad *statutory* sense. Officials opined that unless they were "'closely supervised and controlled'" they would be *constitutional* officers. 12 Op. O.L.C. 18, 26 n.16 (1988) (citation omitted).

C. Plaintiffs Exaggerate The Effect Of A Ruling For Special Counsel

Plaintiffs suggest that a ruling for special counsel would leave *all* debt collectors collecting public debts "free" to harass debtors. Resp. Br. 16-18. That is legally and factually overstated.

Legally, a special-counsel ruling would not cover everyone collecting public debts. The Attorney General's Office, for example, contracts with collection agencies to assist in non-litigation. J.A. 124. But no law authorizes the Attorney General to "appoint" these entities to a position; their relationship is *solely* contractual. Special counsel, by contrast, have long been legally empowered to perform the Attorney General's duties. Pet. Br. 4-5.

Factually, a special-counsel ruling would not leave them "free" to harass debtors. Tax debts prove the point. Although they fall outside the Act, the office requires counsel to abide by the Act's "standards" in that context as elsewhere, and can seek "sanctions" for non-compliance. J.A. 194. It expects counsel to provide services "in a manner that will preserve or enhance [the office's] goodwill." J.A. 193. These are demanding deterrents against abuse enforced by an elected officer and a public office. They surpass the "goodwill" deterrent that led Congress to exempt creditors. S. Rep. 95-382, at 2.

II. Special Counsel's Letters Comport With § 1692e

Plaintiffs wrongly argue: that special counsel violated § 1692e(9) and (14); that those subsections do not require materiality; and that the least-sophisticated-consumer test applies.

A. Plaintiffs Misread § 1692e(9) And (14)

Special counsel did not violate § 1692e(9) or (14) because the letterhead accurately conveyed that the signatories sent the letters in a special-counsel capacity with the Attorney General. In response, Plaintiffs ask this Court to "hold" that the letters violate those subsections. Resp. Br. 60. Yet the Sixth Circuit directed this question to a jury, Pet. App. 54a, and a cross-petition was required "to alter [its] judgment," *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364 (1994). Regardless, Plaintiffs do not even identify a fact dispute.

1. *Simulation Prohibition.* Plaintiffs argue that special counsel's letters simulate documents "*issued*" by the Attorney General's Office and falsely imply that the office is their "*source*." Resp. Br. 41. That is so, Plaintiffs say, because the letterhead suggests that counsel are "employees." *Id.*; U.S. Br. 32-33 (stating that letterhead implies sender is a "member or employee," without defining "member"). This is mistaken.

First, Plaintiffs' argument finds no support in the cited words. "To issue" means to "distribute in an official capacity." *American Heritage Dictionary* 695 (1969); *Black's*, *supra*, at 745. A "source" is the "person or thing that originates, sets in motion, or is a primary agency in producing" something. *Black's*,

supra, at 1251; *Am. Heritage*, *supra*, at 1235. Under those definitions, the Attorney General's Office *issues* the letters and is a *source*. True, the *inanimate* office cannot "issue" or be the "source" of anything. It acts through *people*, and state law permits special counsel to act for the office. Special counsel "distribute" letters in their "official capacity" as special counsel to the Attorney General. *Am. Heritage*, *supra*, at 695. And the office "is a primary agency" for the letters, *Black's*, *supra*, at 1251, because special counsel act for that office.

Second, Plaintiffs' argument finds no support in subsection (9) as a whole. That subsection, which does not mention "employees," does not restrict a State's ability to issue "communication[s]" through whomever it pleases. Many courts use "attorneys to issue subpoenas in the name of the clerk." *Jensen v. Pressler & Pressler*, 791 F.3d 413, 416 (3d Cir. 2015). That does not violate subsection (9) because the court *permits* the attorneys to do so. This case is easier. Private attorneys have almost no connection to a clerk; special counsel have a working relationship with the Attorney General's Office.

Third, Plaintiffs' argument finds no support in general principles. They cite *nothing* suggesting that a person's use of an entity's letterhead implies the person is an *employee*. As Judge Sutton noted, *contractor* agents use their principal's letterhead. Pet. App. 65a-67a. A party's use of another's letterhead does not even permit third parties to assume an *agency*—let alone an *employment*—relationship. One court "could find no cases" where "giving someone" "company stationery, by [itself], created sufficient indicia of apparent authority." *CSX Transp., Inc. v.*

Recovery Express, Inc., 415 F. Supp. 2d 6, 11-12 (D. Mass. 2006); *Drake v. Maid-Rite Co.*, 681 N.E.2d 734, 738 (Ind. Ct. App. 1997). Another found the "use of a trademark not sufficient to raise a genuine issue of material fact" that an actor was an agent. *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1121 (Mass. 2000).

Fourth, Plaintiffs' argument finds no support in comparing special counsel's use of Attorney General letterhead to a private lawyer's use of client letterhead. Resp. Br. 43-44; U.S. Br. 32. The Attorney General is the *lawyer*, not the *client*. The clients are the creditors that the office represents through both assistant attorneys general and special counsel—here, state universities. Special counsel do *not* use university letterhead. Unlike a lawyer and client, moreover, special counsel "work closely *with* Attorney General staff." J.A. 127 (emphasis added). Assistant attorneys general "assist Special Counsel in drafting pleadings, and sometimes join cases as co-counsel." J.A. 130. Special counsel must follow office procedures for preserving records, interacting with debtors, and the like. J.A. 177-78, 191-93, 388. This is not a lawyer-client relationship; it is a lawyer-lawyer relationship.

Fifth, Plaintiffs' arguments find no support in their cases. Resp. Br. 42 n.8. Those cases address letters that did *not* "disclose the identity of the actual sender." *E.g.*, *Del Campo v. Am. Corrective Counseling Servs., Inc.*, 718 F. Supp. 2d 1116, 1134 (N.D. Cal. 2010). Special counsel disclose their identities.

2. *True-Name Provision.* Plaintiffs argue that special counsel's "true name" cannot be both the Attorney General's Office and their firm names. Resp.

Br. 45-47 Plaintiffs rightly disavowed this "two-name theory" below. J.A. 422.

A "true" name is one "conformable to the actual state of things." *Black's*, *supra*, at 1351. Special counsel use Attorney General letterhead with their names and the notation "outside" or "special" counsel. Pet. App. 14a, 17a. That reflects the "actual state of things." A collector may use "multiple names if it consistently uses the same name when dealing with a particular consumer." FTC Staff Commentary, 53 Fed. Reg. 50097, 50107 (Dec. 13, 1988). The contracts require special counsel to notify debtors *consistently* that they are special counsel to the Attorney General. J.A. 173. That name distinguishes the lawyer *as special counsel* collecting debts with a public office from the same lawyer *as private debt collector* collecting debts with a private firm.

Plaintiffs also argue that § 1692e(14) exists primarily to prohibit debt collectors from purporting to be creditors. Resp. Br. 46-47. It exists primarily for the *opposite* reason—to prohibit creditors from pretending to be debt collectors (thereby avoiding risk to their *reputations*). *See* 53 Fed. Reg. at 50107. "Debt collector" is defined to include creditors who use pseudonyms, 15 U.S.C. § 1692a(6), and § 1692e(14) bars debt collectors from using pseudonyms. Regardless, special counsel do not purport to be universities. They purport to be special counsel to the Attorney General's Office (which has an incentive to monitor them by placing *its* reputation on the line).

Plaintiffs lastly claim that special counsel may explain their connection "to the client" in the letter's body. Resp. Br. 47 The Attorney General is *not* a "client." And § 1692e(14) bars "us[ing]" an untrue

name *anywhere*. If the office is not a "true name" in letterhead, the subsection would bar special counsel from "using" its name in the body, the signature block, oral communications, or a complaint.

* * *

Two final points. For one, the Court should not read these subsections in a vacuum; it should read them with § 1692e as a whole. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24 (2012). Just as the general phrase "navigable waters" can determine the meaning of "waters of the United States," so too § 1692e's general ban on false or misleading statements signals what "Congress had in mind" with specific subsections. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). That these letters do not mislead shows that they fall outside the text of subsections (9) and (14).

For another, subsections (9) and (14) are at least ambiguous, triggering the clear-statement rule. Plaintiffs read the Act as transferring from *attorneys general* to *private parties* the power to decide who may use their office's letterhead. This "trench[es] on the States' arrangements for conducting their own governments." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004). And while the United States says the Act preserves "intergovernmental comity," U.S. Br. 23, its brief promotes intergovernmental tension by siding with private parties on that question. The Act should be read to leave the answer where it belongs—with the State.

B. Plaintiffs Wrongly Eliminate Materiality

Plaintiffs argue that subsections (9) and (14) contain no "materiality" element, and that a jury could find that the alleged misrepresentation here was material. Resp. Br. 47-56. They err on the *law* and its *application*.

Law. Plaintiffs claim the text of subsections (9) and (14) precludes materiality. Yet, as circuit courts recognize, "[m]ateriality is an ordinary element of any federal claim based on a false or misleading statement." *Hahn v. Triumph P'ships, LLC*, 557 F.3d 755, 757 (7th Cir. 2009); *Jensen*, 791 F.3d at 417 (citing cases). The subsections here use text that falls within that rubric—e.g., "falsely represent," 15 U.S.C. § 1692e(9), or use a name "other than" a "true" name, *id.* 1692e(14). *Cf.* 53 Fed. Reg. at 50107 (noting that "collector may use a name that does not misrepresent his identity or deceive the consumer").

Examples from each subsection illustrate this point. For § 1692e(9), an attorney who issues a valid subpoena under the wrong clerk's name makes "a 'false representation' in the most technical sense." *Jensen*, 791 F.3d at 417 But it is not material because it could not affect debtors. *Id.* at 422. For § 1692e(14), when Chase Bank collects debts as "Chase Auto Loans," not "JPMorgan Chase Bank, N.A.," it uses a name technically other than its true name. *Berk v. J.P. Morgan Chase Bank, N.A.*, 2011 WL 4467746, *4 (E.D. Pa. Sept. 26, 2011). But "no reasonable person would find that 'Chase Auto Loans' is a false identification of" Chase. *Id.* Recognizing that Congress did not intend "such hair-splitting" recognizes materiality. *Id.*

Contrary to Plaintiffs' claim (Resp. Br. 50-51), the absence of intent and injury elements in the Act reinforces the materiality element. While those provisions fulfill Congress's purpose to punish real abuse, materiality fulfills Congress's purpose to protect honest collectors. 15 U.S.C. § 1692(e). Thus, when rejecting a mistake-of-law defense, the Court stated that the Act's "conduct-regulating provisions" (like § 1692e) "should not be assumed to compel absurd results when applied to debt collecting attorneys." *Jerman*, 559 U.S. at 600. Without materiality, the Act opens the door to damages for "misrepresentations" about a letter's color, *Hahn*, 557 F.3d at 757, or for dropping "LLC" from a name.

Application. Plaintiffs' materiality theories do not match their falsity theory—that the letters imply that special counsel are "employees," Resp. Br. 41. Nowhere do Plaintiffs explain—or cite anything in the record to suggest—why consumers would care about this legal distinction between employees and contractors. The average consumer (perhaps even the average lawyer) likely does not know that this distinction often turns on a multi-factored balancing test that can lead to different conclusions across a range of laws. *Cf. Reid*, 490 U.S. at 751-52. Special counsel, moreover, have the same powers as assistant attorneys general *vis-à-vis debtors*. Pet. Br. 51-52. The debts are also subject to all of the same priorities—e.g., the State's ability to use tax refunds in satisfaction, Ohio Rev. Code § 5747.12, or to collect for an extended period, J.A. 125.

Plaintiffs' materiality theories turn, not on the *allegedly untruthful* implication that special counsel are employees, but on the *entirely truthful* implica-

tion that the Attorney General's Office collects debts. Most consumers do not know that the office is "in the collections business," Plaintiffs say, so the *mere* use of its name leads debtors to fear "criminal penalties or other severe consequences." Resp. Br. 53. These allegations conflict with Plaintiffs' concession that special counsel may *identify* the office in the letters. Resp. Br. 47 They also suggest that the office's employees *themselves* would violate the Act (but for the government exemption) when they send letters to debtors on office letterhead before special counsel get involved. J.A. 124. But "[t]hrough the structure of its government, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Plaintiffs' reading of materiality "trench[es] on" the manner in which Ohio has long collected debts. *Nixon*, 541 U.S. at 140.

C. Plaintiffs Cannot Salvage The Least-Sophisticated-Consumer Test

Courts should consider whether a statement is misleading from an average consumer's perspective. Pet. Br. 40-43. While Plaintiffs call this issue "waived" (Resp. Br. 56), it is "included" in the second question, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995).

Their argument that "little daylight" separates these standards also does not help them. Resp. Br. 57. It proves Judge Easterbrook's point that courts adopting the least-sophisticated-consumer test do so in *name*, but apply another rule in *practice*. *Gammon v. GC Servs. Ltd. P'ship*, 27 F.3d 1254, 1259 (7th Cir. 1994) (Easterbrook, J., concurring). Courts preserve a reasonableness standard, which requires showing that "a significant fraction of the letter's ad-

dressees [could be] deceived—for if showing a handful of misled debtors were enough, [courts] would as a practical matter be using the 'least sophisticated consumer' doctrine." *Id.* at 1260.

Plaintiffs respond that a reasonableness test will not protect the *most* unsophisticated. Resp. Br. 57-58. But "'no legislation pursues its purposes at all costs.'" *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (citation omitted). The Act has a *competing* purpose to protect conscientious collectors. 15 U.S.C. § 1692(e). Plaintiffs also fail to show their test's "historical pedigree." Resp. Br. 58-59. They cite cases from the FTC Act and trademark law, but courts there look to *reasonable* consumers. Pet. Br. 40-43.

The United States advocates for a reasonable-unsophisticated-consumer test—an average consumer under another name. U.S. Br. 34. Rejecting the least-sophisticated-consumer test becomes imperative if, as the United States notes (U.S. Br. 30), a jury should usually decide whether a consumer could be misled. *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 911 (2015). The least-sophisticated-consumer test would mislead *jurors*. Regardless, "a judge may decide" this "question on a motion for summary judgment" when "the facts warrant it." *Id.* at 911; *Scott v. Harris*, 550 U.S. 372, 378-79 (2007). They warrant it here. The United States' paragraphs on why a fact question exists cite nothing but the letters. U.S. Br. 32-33. Judge Sutton could not have said it better: "How these letters could be misleading is beyond me." Pet. App. 8a. No jury could find a violation of § 1692e.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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